

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**PATRICIA JOHNSON**  
Claimant

VS.

**VENTURE STORES, INC.**  
Self-Insured Respondent

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Docket No. 210,246

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the November 19, 2009, Award on Motion to Terminate Post-Award Medical Benefits entered by Administrative Law Judge Rebecca A. Sanders. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. D. Steven Marsh, of Wichita, Kansas, appeared for the self-insured respondent. This appeal was placed on the Board's summary calendar for disposition without oral argument.

The Administrative Law Judge (ALJ) found that she had no jurisdiction to terminate medical treatment by respondent's motion under the provisions of K.S.A. 44-510k(a). In the event the ALJ had jurisdiction to rule on the merits, respondent's motion would have been denied and treatment with Dr. James Eyman would have been continued to be authorized and the prescription medication for claimant's depression, anxiety and sleep problems would have continued to be ordered paid. The ALJ found that respondent was obligated to continue medical benefits as previously ordered.

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Respondent argues that the ALJ erred in finding that she had no jurisdiction under K.S.A. 44-510k to rule on the merits of its motion to terminate medical benefits. In the event the Board finds the ALJ had jurisdiction to rule on respondent's motion, it asserts that claimant's current psychological issues no longer relate to her workers compensation injury and payment of her medical expenses by respondent should be terminated.

Claimant argues that the ALJ properly found she had no jurisdiction to rule on respondent's motion. Claimant also contends that respondent failed to follow appropriate procedures in its attempt to terminate claimant's medical services and, further, stopped making payments for the authorized medical without placing the issue before the ALJ.<sup>1</sup> In the event the Board finds the ALJ had jurisdiction to rule on respondent's motion, claimant asserts that she has suffered a set-back and relapse of psychiatric difficulties relating to her work-related anxieties and challenges and asks the Board to allow her to continue with her approved medical treatment.

The issues for the Board's review are:

(1) Did the ALJ have jurisdiction to rule on the merits of respondent's motion to terminate medical benefits?

(2) If so, should claimant's authorized medical treatment be terminated because her current psychological problems are not related to her injury of January 18, 1996?

#### **FINDINGS OF FACT**

On January 18, 1996, claimant slipped and fell in the parking lot of respondent's store. When she fell, she hit the back of her head on the cement and suffered a head injury. She has not been able to work since 1996 due to problems with anxiety, memory loss and depression.

Claimant has been evaluated and tested by several psychiatrists and psychologists. She began treatment with James Eyman, Ph.D., a psychologist, in February 1996, and he was eventually authorized by the ALJ to treat her on April 25, 1997. In a deposition taken on March 19, 1999, Dr. Eyman testified:

. . . I think that it is important to continue with the psychotherapy to help her still manage her anxiety and depression and compensate for her deficits, to help her continue to deal with what she's learning to be the warning signs of getting anxious or depressed and in general to facilitate her daily functioning.<sup>2</sup>

Claimant received a permanent total disability award on October 8, 1999. The Award noted that both Dr. Eyman and Dr. Sharon McKinney continued to be authorized to provide

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<sup>1</sup> Claimant has not raised any issue concerning penalties in this appeal.

<sup>2</sup> Eyman Depo. (Mar. 19, 1999) at 16.

claimant psychological and medical treatment.<sup>3</sup> Claimant's personal physician, Dr. Mary Franz, was later authorized to prescribe and monitor her medications. The Award was appealed to the Board and was affirmed.<sup>4</sup> The disability compensation awarded in the October 8, 1999, Award has been paid out in full, and the only benefit claimant continues to receive is medical treatment. Claimant testified that when she first started seeing Dr. Eyman, she saw him once a week, then twice a month, and then once a month.

Dr. Eyman testified that claimant had been doing well in her treatment, and he was getting ready to terminate her therapy as to her issues involved in her work related injury. He said that in September 2008 he had reduced her appointments to every other month and, if she remained stable, he was thinking about terminating treatment in April or May 2009. However, before that time, he received a letter from respondent advising him that claimant's treatment had been discontinued because according to an independent medical examination, claimant had been found to be at maximum medical improvement.

On February 13, 2009, claimant was evaluated by Dr. Patrick Caffrey, a psychologist, at the request of respondent. Dr. Caffrey ran a battery of tests on claimant, some of which were the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), which evaluates emotional status and personality characteristics; the Millon Clinical Multiaxial Inventory III (MCMI-3) test, which provides insight regarding emotional status and personality characteristics but more specific to axis II type diagnostic impressions such as personality disorders; and the Test of Memory Malinger (TOMM), an effort test which is useful in determining the person's level of effort during the evaluation.

Claimant told Dr. Caffrey that her main problem was her memory. She said that when cooking, she would forget to add ingredients or would leave the stove or oven on. When driving, she could forget where she was going. She also described problems with anxiety. Noise makes her anxious. She has claustrophobic reactions to being in elevators and closets. She described behavior which sounded to Dr. Caffrey like she had a form of social phobia, perhaps agoraphobia. She was tearful and agitated during portions of the testing. Claimant also said she had speech fluency problems. But during the interview, claimant's speech was clear, fluent and free of articulation errors. Dr. Caffrey did not notice that she had difficulty with speech fluency.

Dr. Caffrey testified that when he asked claimant to give him the current date, she gave the wrong date, which seemed intentional to him because he had the correct date written on a piece of paper that was visible to her. She seemed to look at the paper and

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<sup>3</sup> Dr. McKinney was authorized to manage claimant's medication, which includes an antidepressant and a sleep aid. After Dr. McKinney's retirement, at least two other physicians managed claimant's medication, and at the time of the motion hearing her medication was being prescribed by Dr. Franz, her personal physician.

<sup>4</sup> *Johnson v. Venture Stores*, Docket No. 210,246, 2000 WL 235495 (Kan. WCAB Feb. 24, 2000).

then provided the wrong date. Also, he said sometimes claimant seemed to have good recall of historical facts and other times she did not. He opined there was a kind of selective aspect to her recall.

Dr. Caffrey also said that the results of the TOMM test suggested claimant gave suboptimal effort. He said that claimant scored so dramatically below the cutoff on the TOMM that it made it easy to conclude that she was suppressing the answer, in other words, knowing the right answer but suppressing it. Also, the results of the MMPI-2 revealed that claimant's Fake Bad Scale raw score was 22, which is consistent with individuals who exaggerate their claims of disability. Dr. Caffrey does not believe that claimant is a fraud or is malingering, but she is maintaining the sick role without obvious external incentives.

Further, the testing showed that claimant fell in the minimum range for intensity of depression and anxiety. The MMPI-2 showed that claimant tended to endorse problems with somatic complaints and focused on physical complaints almost to the point of being preoccupied with physical health problems. The scale specifically related to post-traumatic stress syndrome was low. The MCMI-3 test indicated that she was reluctant to share on an emotional level. She had high scores for desirability, meaning she responded to items in such a way that it presented her in a favorable light. Claimant had high scores on the MCMI-3 test for compulsive and histrionic personality patterns.

Dr. Caffrey gleaned from claimant's medical records that before her work injury in 1996, she had two breakdowns and two suicide attempts. He was also able to determine that she had a history of sexual and physical abuse. Her father abandoned the family when she was 6 years old, and she became pregnant at age 13. She has been married six times. When Dr. Caffrey asked claimant about her condition before 1996, she did not disclose that she had the former breakdowns and suicide attempts. Dr. Caffrey said either she could not remember, forgot to tell him, or did not want to tell him. He said claimant's history indicates that well before the work injury, she had problems and issues that might indicate a history of psychological disorders.

After reviewing claimant's medical history, interviewing claimant and her husband, and reviewing the results of the tests, Dr. Caffrey diagnosed her with factitious disorder with predominantly psychological signs and symptoms, panic disorder with agoraphobia, and social phobia, generalized. He also found she had obsessive-compulsive personality traits and histrionic personality features.

Dr. Caffrey believes that claimant's psychological issues no longer relate directly to her injury. He believes she is still in need of psychological treatment. He does not think her need for psychological treatment is a natural and direct consequence of her work injury on January 18, 1996, but is because of other factors. He opined that claimant is at maximum medical improvement for her work injury. He indicated that she needs continued medication for her depression and to aid her with sleep. But he does not believe her need for

medication is a natural and direct consequence of her work injury but rather is due to her factitious disorder, anxiety and personality disorders. He believes those are preexisting conditions.

Dr. Eyman testified that he has been working with claimant on ways to compensate for her memory impairment and adjust to her cognitive difficulties which were the result of her accident of January 18, 1996. They have also addressed her depression and anxiety. Dr. Eyman said that claimant has been taking antidepressant and sleep medication for awhile, and the need for the medication is related to her work injury.

Dr. Eyman does not agree with Dr. Caffrey's opinion that claimant has a factitious disorder. He said that while it is true that claimant did not put maximum effort into the testing, it was not because she intentionally tried to exaggerate her symptoms but has to do with her being quite anxious and reacting to things in an exaggerated way. He said that claimant is not a psychologically sophisticated woman who could figure out what she should or should not do to present herself in a certain way.

Dr. Eyman has diagnosed claimant with depression, anxiety, post-concussion syndrome, and a dependent personality disorder with histrionic features. She acts out and is dependent on others and behaves in a histrionic manner in response to the psychological and post-concussive injuries she sustained at work. Dr. Eyman testified that claimant's main cognitive deficit is her memory problem. Psychologically, the way she reacts is by relying on others for help and by becoming very upset. She is easily overwhelmed. Dr. Eyman said that the post-concussion syndrome, depression and anxiety are related to her work injury, but the dependency and histrionic behavior are related to her personality.

Dr. Eyman said that claimant has been depressed and anxious at various times in her life before and after her injury. She has had a difficult life up to the point when she fell in January 1996. Dr. Eyman said that although claimant had depression and anxiety in the past, she was not depressed or anxious at the time of the injury. Since January 1996, she has had additional stressors in that both her mother and mother-in-law died. Also, her husband and daughter have health problems. These stressors exacerbated her depression and anxiety.

Dr. Eyman has not performed any psychological or neuropsychological tests on claimant. Claimant did have psychological testing done in 1996 or 1997, and Dr. Eyman has been relying on the results of that testing in her psychotherapy. He treats her in psychotherapy, which involves meeting with her for discussion and counseling.

Dr. Eyman said that claimant has had a setback because of the potential that her workers compensation benefits would be terminated. Dr. Eyman believed that she would return to the level where she could be terminated from treatment for the work injury after it becomes clear that she will continue to receive her medication. Soon after that, he believes she would go back to how she was and he would terminate his treatment at that point. He

believes, however, that she will continue to need ongoing medication for depression and anxiety for a long time, if not the rest of her life. He believes this was a result of the accident. Once Dr. Eyman discontinues her treatment for the work injury issues, he will continue seeing her for her pre-injury issues, using her Medicare.

Claimant did not miss any therapy treatments after Dr. Eyman received the letter from respondent saying his services would not be authorized any longer. He continued to treat her because to stop would not have been in her best interest. He said that claimant missed getting her Lexapro for awhile, and he told her to fill the prescription on her own without insurance payment.

On May 11, 2009, respondent filed a Motion to Terminate Post-Award Medical Benefits, claiming that claimant's psychological problems were not a natural and direct consequence of her work injury pursuant to Dr. Caffrey's March 11, 2009, report.

#### **PRINCIPLES OF LAW AND ANALYSIS**

##### **(1) Did the ALJ have jurisdiction to rule on the merits of respondent's motion to terminate medical benefits?**

K.S.A. 2009 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-528(a) states:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one

or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

The Board has previously addressed the issue of respondent's right to seek modification of post-award medical treatment most recently in *Bachmurski*.<sup>5</sup> In that case, as here, the ALJ found he was without jurisdiction to consider respondent's post-award motion because K.S.A. 44-510k(a) only provided for "the employee" to make an application for a hearing on the issue of post-award medical treatment. In *Bachmurski*, the issue was a change of physician rather than the termination of benefits, but the jurisdictional issue is the same.<sup>6</sup> The Board said:

And while these statutes [K.S.A. 44-510h and K.S.A. 44-510k] only reference an employee, these are not the only statutes contained within the Act that deal with a party's entitlement to a hearing as it relates to medical treatment or, for that matter, any dispute as to benefits available under the Act.

K.S.A. 44-534 provides that:

Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon **any issue** in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. (Emphasis added)

That same statute goes on to direct the Director of the Division of Workers Compensation to provide a form for this request and to promulgate rules and regulations to implement this statute and directs the administrative law judge to conduct a hearing, after appropriate notice and make a finding concerning the

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<sup>5</sup> *Bachmurski v. The Farm, Inc.*, Docket Nos. 176,960 & 176,961, Kan. WCAB Feb. 26, 2010.

<sup>6</sup> However, in this case, unlike *Bachmurski*, the authorized treating physician was court ordered. Accordingly, it was improper for respondent to attempt to discontinue Dr. Eyman's treatment without first obtaining an order from the ALJ.

amount of compensation, if any, due to the worker.<sup>7</sup> It has long been held that medical treatment constitutes compensation under the Act.<sup>8</sup>

And even after a case is decided (by Award) or settled (by agreement), there is a statutory avenue for either claimant or respondent to request Review and Modification. K.S.A. 44-528 provides:

Any award or modification thereof agreed upon by the parties . . . may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party.

Here, the ALJ seemed to consider just the statutes that speak exclusively to a claimant's right to seek a change of physician or post-award medical treatment and did not consider the other statutes referenced above. Contrary to the ALJ's view, these statutes do not foreclose a respondent's right to seek a judicial determination when there is a dispute (post-award) as to the claimant's medical treatment. Rather, they provide a specific procedure when claimant seeks a change in medical provider or additional (post-award) medical treatment. Indeed, it is respondent's obligation to provide medical treatment which is intended to cure and relieve the effects of claimant's injury.<sup>9</sup> That obligation comes with the right to direct claimant's care, subject to the findings and conclusions of the ALJ. The fact that claimant is satisfied with Dr. Hall and his treatment protocol and wants to continue under his care does not invalidate the other provisions of the Act.

When interpreting statutes, effect must be given, if possible, to the entire act and every part thereof.<sup>10</sup> It is the duty of the Court, as far as practicable, to reconcile the different statutory provisions so as to make them consistent, harmonious and sensible.<sup>11</sup> The legislature intended the Act to apply impartially to both parties.<sup>12</sup>

It is illogical to suggest that either K.S.A. 44-510h(b)(1) or K.S.A. 44-510k(a) forecloses respondent's right to direct an injured employee's care or, after an award is issued, only claimant is permitted to seek a judicial determination of the need for further medical treatment under K.S.A. 44-510k(a). It is certainly more likely that

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<sup>7</sup> K.S.A. 44-534.

<sup>8</sup> *Shields v. J.E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 946 P.2d 94 (1997).

<sup>9</sup> K.S.A. 44-510h(a).

<sup>10</sup> *McIntosh v. Sedgwick County*, 282 Kan. 636, 147 P.3d 869 (2006).

<sup>11</sup> *Id.*

<sup>12</sup> K.S.A. 44-501(g).



a claimant will be in the position of *seeking* additional treatment or a change of physician. And for those instances, there is a specific statute that authorizes such a request. But those statutes do not invalidate the remaining provisions of the Act which give a respondent the opportunity to file a request for a hearing to resolve a dispute, as here, over its intention to change claimant's treating physician and her unwillingness to acquiesce in that intended change.

Accordingly, the Board reverses the ALJ's Post Award Medical Order and finds that the ALJ did have jurisdiction to consider respondent's request to change claimant's treating physician from Dr. Hall to Dr. Sankoorikal.<sup>13</sup>

The Board finds that the ALJ and the Board have jurisdiction to consider respondent's motion.

**(2) Should claimant's authorized medical treatment be terminated because her current psychological problems are not related to her injury of January 18, 1996?**

In a post award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the effects of the original accidental injury which was the subject of the underlying award.<sup>14</sup> If a claimant is requesting post-award medical treatment, the claimant has the burden to prove her right to an award of compensation and prove the various conditions on which his right depends.<sup>15</sup> Conversely, if the respondent is seeking to terminate previously ordered compensation (medical treatment), the respondent, as the party seeking modification, bears the burden of proof.<sup>16</sup> Furthermore, *res judicata* bars relitigation of issues such as causation that are based on past facts.<sup>17</sup>

Dr. Eyman was authorized to treat claimant by order of the ALJ. That authorization has never been withdrawn or altered. To be clear, respondent is not seeking to change claimant's authorized treating health care provider. Rather, respondent seeks an order terminating all psychological treatment. Respondent's motion contemplates removing Dr. Eyman's status as an authorized treating physician and terminating all psychological counseling. In addition, respondent contemplates ending its responsibility for providing any

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<sup>13</sup> *Bachmurski*, Board Order (Feb. 26, 2010) at 5-6.

<sup>14</sup> See K.S.A. 2009 Supp. 44-510k(a).

<sup>15</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>16</sup> K.S.A. 44-528; *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

<sup>17</sup> See *Brandt v. Kansas Workers Compensation Fund*, 19 Kan. App. 2d 1098, 1101, 880 P.2d 796, *rev. denied* 256 Kan. 994 (1994).

medication. It is respondent's contention that claimant's ongoing need, if any, for additional counseling and/or medication is not for claimant's work-related injury but, rather, is due to preexisting and/or intervening conditions. Conversely, claimant contends she is still in need of this treatment as a direct consequence of her work-related injury.

The Board finds claimant continues to be in need of psychological treatment as a direct result of her work-related injuries. While claimant has other stressors that are contributing to her need for treatment, her need for treatment is not exclusive to non-work related factors. Dr. Eyman has gradually reduced the frequency of claimant's counseling sessions as circumstances have warranted, from weekly, to bi-monthly, to monthly and then once every other month. Dr. Eyman appears to be on course to terminate claimant's counseling sessions entirely, but his intention to do so in April or May 2009 was changed due to circumstances. It does not make Dr. Eyman's opinions any less credible that he allowed claimant's condition to dictate this schedule as opposed to strictly adhering to his predicted time line. Dr. Eyman believes that claimant is continuing to benefit from the therapy and the medications and that these treatments are necessary to cure or relieve the effects of the work-related accident and injuries.

Based upon the opinion of Dr. Eyman, who has treated claimant over a considerable period of time and therefore is most familiar with her condition, the Board finds that claimant's medical treatment benefits should not be terminated at this time.

#### **CONCLUSION**

(1) The ALJ had jurisdiction to rule on respondent's motion to terminate medical benefits.

(2) Claimant's authorized medical treatment should not be terminated. Respondent's motion is denied.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award on Motion to Terminate Post-Award Medical Benefits entered by Administrative Law Judge Rebecca A. Sanders dated November 19, 2009, is reversed as to her finding of no jurisdiction, but her denial of respondent's motion to terminate benefits is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
D. Steven Marsh, Attorney for the Self-Insured Respondent  
Rebecca A. Sanders, Administrative Law Judge